

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:
NATIONAL PRESCRIPTION
OPIATE LITIGATION

Case No. 1:17-md-2804
Cleveland, Ohio

CASE TRACK THREE

October 4, 2021
11:30 A.M.

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TRANSCRIPT OF PRETRIAL PROCEEDINGS,
BEFORE THE SPECIAL MASTER DAVID COHEN,
UNITED STATES DISTRICT JUDGE,

- - - - -

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1 MONDAY, OCTOBER 4, 2021, 11:34 A.M.

2 SPECIAL MASTER COHEN: There are some folks
3 that are continuing to work on the tech. You can go
4 ahead and continue to do that while we hold the hearing.

11:36:22 5 I'm going to ask everybody to continue to
6 identify themselves for the record. There are a lot of
7 people in the courtroom, and Sue, our Court Reporter,
8 will eventually know everybody, but at least for now, if
9 you could continue to do that, I think --

11:36:40 10 MR. WEINBERGER: Do you want me to close
11 that door? There are people outside that are not
12 identified.

13 SPECIAL MASTER COHEN: Yes. Does somebody
14 want to close that door?

11:36:51 15 (Pause.)

16 SPECIAL MASTER COHEN: Is there anybody in
17 the courtroom besides counsel?

18 Okay. So we're here to discuss objections
19 to the PowerPoint slides in opening statements.

11:37:09 20 I understand that the defendants want to
21 object to plaintiffs' slides and that plaintiffs want to
22 object to some of Giant Eagle's slides.

23 I did receive -- I'm not sure when I
24 received it, but this morning I reviewed the list of
11:37:23 25 objections, and I've spent a little bit of time, not a

1 lot, haven't had time, to look at the slides themselves.

2 And so what we're going to do is just go
3 slide by slide. We're not going to spend a lot of time
4 arguing each side. I need a very quick statement of what
11:37:43 5 it is that the defendants object to, and I mean very
6 quick. I may ask the plaintiffs to respond. I may not.
7 And we're just going to go through it slide by slide.

8 Before I start, though, this tie used to
9 belong to Francis McGovern. It's now around my neck and
11:38:05 10 I know that Francis loved doing this and loved being a
11 part of this and I'm sorry that he's not here so I'd like
12 to just have five seconds of silence in honor of the
13 memory of Francis.

14 (Pause.)

11:38:21 15 SPECIAL MASTER COHEN: Thank you.

16 All right. So I am now looking at the
17 slides.

18 Who's going to speak for defendants?

19 MS. SWIFT: Special Master Cohen, it's Kate
11:38:44 20 Swift for Walgreen's.

21 SPECIAL MASTER COHEN: Can you pull your
22 microphone a little closer?

23 MS. SWIFT: Certainly.

24 And I'm perfectly happy to go through each
11:38:50 25 side if that's what you want to do but we were hoping to

1 streamline them for you if we could.

2 We identified a list of objections last
3 night. Working quickly, we've narrowed it a bit to two
4 categories of objections, which I'm happy to address
11:39:03 5 first.

6 SPECIAL MASTER COHEN: That's fine. Go
7 ahead.

8 MS. SWIFT: So the first category is
9 misstatements of the law, and then the second is
11:39:11 10 misstatements of expert testimony.

11 With respect to the misstatements of the
12 law, we would start with Slide Number 3 and we have extra
13 copies if you need them.

14 SPECIAL MASTER COHEN: I've got it.

11:39:23 15 MS. SWIFT: You've got it?

16 Slide 3 says that, "It's your job as jurors
17 to figure out if these pharmacy companies are partly to
18 blame for the crisis," which is a misstatement of the
19 legal standard.

11:39:35 20 The standard is whether the pharmacies were
21 a substantial factor in creating the public nuisance.
22 That's the objection.

23 SPECIAL MASTER COHEN: Plaintiffs?

24 MR. LANIER: Your Honor, Mark Lanier
11:39:49 25 responding for plaintiffs.

1 Partly to blame is just the way I would
2 word it. This is in layman's terms and they've got to be
3 a significant part. There's no doubt about that. And
4 this is opening statement and I think that I'm entitled
11:40:04 5 to say that.

6 I think I could have said that without
7 putting it on the slide and just said, you know, that's
8 what you're here to do.

9 Are they part of the blame? To be blamed,
11:40:15 10 you've got to be a significant contributing factor. Are
11 they one of those? The defendants have been trying to
12 wage this whole time that there are others who are
13 responsible and they have no culpability, and the trial
14 is one, not to determine damages, not to determine money,
11:40:29 15 but simply to determine if they're part of that blame.

16 And that decision is made by reading the
17 charge and answering the questions.

18 SPECIAL MASTER COHEN: Right. Thank you.

19 I think you need to change this to read
11:40:41 20 "similarly to," the same as the jury instruction, which
21 Kate quoted.

22 You can say what you want to say. You can
23 use that language, but this slide needs to set out,
24 because it's written and it's going to be read by the
11:40:53 25 jury, substantial cause of a public nuisance or something

1 like that.

2 Next.

3 MS. SWIFT: The next is on, it's a set of
4 slides that is addressed on Page 2 of the objections.
11:41:07 5 It's Slides 66, 79, 91, and 93.

6 All of these slides have the same issue.
7 It's a misstatement of the law with respect to the
8 pharmacies's obligations.

9 These slides say, "Dispensers must dot,
11:41:27 10 dot, dot, provide suitable tools to pharmacists, red flag
11 education, training, tools."

12 And that's not the standard. Judge Polster
13 has ruled that the CSA and its regulations do not specify
14 what controls and procedures a pharmacy must use to
11:41:45 15 prevent diversion. That's in his order on
16 reconsideration at Docket 3499 at Page 7.

17 SPECIAL MASTER COHEN: Can you hand me that
18 order -- can you hand me that order?

19 MS. SWIFT: Yes, sir.

11:41:57 20 SPECIAL MASTER COHEN: Do you want to
21 respond, Mark?

22 MR. LANIER: Sure, Your Honor.

23 I think this is exactly what the *Holiday*
24 case holds, but I'm glad to change it to provide suitable
11:42:10 25 tools to pharmacists, and then where I have red flag

1 education, training and tools, all I had planned on
2 saying, you know, for example -- thank you -- red flag,
3 education, training, and tools. I'll be glad to put, you
4 know, "EG" for as an example in front of that.

11:42:31 5 You know, those are good examples. The
6 law's not precise on exactly what everybody must do
7 beyond providing suitable tools. And so those are
8 examples that I plan on using.

9 They need to train them. They need to give
11:42:44 10 them the tools. Red flags are something that's used by
11 the DEA over and over and over and over. It's used
12 within the companies themselves.

13 And that's what I think they ought to do.

14 SPECIAL MASTER COHEN: So what are
11:42:57 15 you -- what are you proposing that you do besides "EG"?

16 MR. LANIER: I could say "For example,
17 comma."

18 SPECIAL MASTER COHEN: Anything else?

19 MR. LANIER: "Up to and including."

11:43:15 20 I mean --

21 SPECIAL MASTER COHEN: I thought there was
22 something else you were going to say.

23 MR. LANIER: I was just going to say EG,
24 you know, which is the abbreviation, Latin abbreviation
11:43:25 25 of "for example."

1 SPECIAL MASTER COHEN: I think that is a
2 good idea to add, "For example."

3 Otherwise, the objection is overruled.

4 Next.

11:43:31 5 MR. LANIER: Okay.

6 MS. SWIFT: The third category is
7 misstatements as to Craig McCann's expert testimony.
8 This is Slide 118.

9 And there are two issues with this slide.
11:43:49 10 The first is with the second bullet.

11 SPECIAL MASTER COHEN: Is this the one -- I
12 just want to make sure we're on the same -- is this the
13 one that says "data analyst" on the top?

14 MS. SWIFT: Yes.

11:44:00 15 SPECIAL MASTER COHEN: Go ahead.

16 MS. SWIFT: The second bullet says that
17 Craig McCann investigated distributor defendants'
18 behavior. He didn't. He didn't look at a single
19 defendant system and he has no opinion whatsoever as to
11:44:12 20 whether any defendant did anything wrong. He didn't look
21 at our behavior and offer opinions on it.

22 Then the second issue is with the language
23 in the box that says, "He will testify to the amount of
24 the defendants' failures on suspicious orders."

11:44:25 25 Again, Dr. McCann has unequivocally

1 disclaimed any opinion about whether his flagged orders
2 are actually suspicious. That's well beyond the scope of
3 his expertise.

4 SPECIAL MASTER COHEN: Plaintiffs?

11:44:38 5 MR. LANIER: Okay. On the first one,
6 investigated distributor defendants' behavior, that's the
7 data that he has investigated, how many pills did they
8 put out and how many are there, and that's the behavior.

9 They're in the dispensing business. I
11:44:53 10 could say, "Investigated distributor defendants'
11 dispensing numbers," if that's better.

12 As for testifying to the amount of the
13 defendants' failures on suspicious orders, he's
14 bootstrapping from Carmen Catizone and others about what
11:45:09 15 the suspicious orders are. He's not determining the
16 suspicious orders.

17 Read properly, this reads that way, too.
18 He'll testify to the amount of the failures on suspicious
19 orders. He's handed, "Here is the suspicious order
11:45:24 20 criteria. Can you give us the amounts," and that's what
21 he'll testify to, the amounts.

22 SPECIAL MASTER COHEN: Make sure my phone
23 is off.

24 You know, opening statement is a promise.
11:45:35 25 You're making some promises that defendants think you

1 won't be able to keep but that's up to you.

2 That objection's overruled.

3 Next slide.

4 MS. SWIFT: Special Master Cohen, that's

11:45:48 5 the last one that I was going to address. I believe

6 others may have others they want to speak to.

7 SPECIAL MASTER COHEN: Okay.

8 MS. SWIFT: Maybe.

9 MS. FUMERTON: Special Master Cohen -- this

11:46:03 10 is in the way. Can you hear me?

11 SPECIAL MASTER COHEN: Yes.

12 MS. FUMERTON: Tara Fumerton on behalf of

13 Walmart.

14 The only other slide that we wanted to

11:46:12 15 discuss was Slide 87, and that's the slide of Nicole

16 McCallion, who's a foster parent.

17 We just wanted to remind the Court that we

18 have an objection on file to this witness. That's docket

19 3941, and we're objecting to her testimony on relevance,

11:46:24 20 402 and 403, and as an improper lay opinion. It just has

21 not been ruled upon.

22 SPECIAL MASTER COHEN: And I haven't looked

23 at it.

24 What makes it improper?

11:46:45 25 MS. FUMERTON: Well, Special Master Cohen,

1 I think for several different reasons.

2 One, on the relevance front. The opinion
3 of a particular foster parent on -- without any ties to
4 any of the defendants' products, and with respect to, you
11:46:59 5 know, whether or not a public nuisance exists or we were
6 a substantial cause to it is not probative and is
7 unfairly prejudicial.

8 SPECIAL MASTER COHEN: Is she simply and
9 only that, a foster parent, or does she have some role in
11:47:13 10 like a foster parent organization?

11 MS. FUMERTON: My understanding is that
12 she's just going to be testifying, excuse me, about her
13 personal experience, but plaintiffs can let us know if
14 that's wrong.

11:47:24 15 MR. LANIER: That is correct, Your Honor.
16 She's a foster parent who has fostered these children
17 through a lot of this mess and is here to offer her fact
18 testimony. She's a fact witness.

19 SPECIAL MASTER COHEN: Well, once again, so
11:47:35 20 the Court -- and it might not be me -- will eventually
21 rule on the admissibility of any testimony from this
22 witness.

23 It's your risk to make a promise during
24 opening statement that you can't keep.

11:47:49 25 MR. LANIER: Understood.

1 SPECIAL MASTER COHEN: So as such, I'll
2 overrule the objection.

3 MS. FUMERTON: Thank you.

4 SPECIAL MASTER COHEN: Any other -- go
11:48:03 5 ahead.

6 MR. HYNES: Paul Hynes for CVS.

7 This is a question for plaintiffs on
8 Slides, I think it is 48 and 49. Mr. Lanier, are those
9 video clips you're going to play or pictures you're going
11:48:17 10 to show?

11 MR. LANIER: They're not video clips I'm
12 going to play and it's not anything I'm going to dwell on
13 beyond just mentioning the fact that he's been on TV, 60
14 Minutes, he's testified in front of Congress. It's just
11:48:30 15 bam, bam, bam.

16 MR. HYNES: Okay, fine.

17 Then Slides 103 and 104, Slide 103 has the
18 words "Profits" in big letters. The next slide shows
19 pictures of dollar bills. The ruling at Docket 3058 at
11:48:47 20 Page 59 says the Court will exclude evidence regarding
21 defendants' overall financial conditions and assets but
22 will allow evidence regarding defendants' revenues and
23 profits related to opioid sales."

24 This slide has no connection to opioids.
11:49:06 25 Defendants have taken no discovery as to profitability as

1 it relates to opioids. We think those slides are --

2 SPECIAL MASTER COHEN: That objection is
3 overruled. Overruled.

4 MR. HYNES: Okay.

11:49:19 5 MS. FUMERTON: Special Master Cohen, I have
6 actually one more and I'm not sure, we had raised this
7 with plaintiffs earlier today and, Mark, I don't know if
8 you are still considering that but on Slide 76, there was
9 an improper Walmart logo and we called plaintiffs this
11:49:34 10 morning and asked them to switch it out.

11 MR. LANIER: I'm -- if you'll give me the
12 proper Walmart logo, I'm glad to use it.

13 MS. FUMERTON: Well, I think, Mark, that
14 you have used it in other slides so this is just the one
11:49:46 15 slide.

16 MR. LANIER: Okay. If you'll show me,
17 Tara, which is the proper one, I'll be glad to change it.
18 How's that?

19 MS. FUMERTON: Okay. We'll do so.

11:49:54 20 MR. LANIER: And you can just look over my
21 shoulder and say, "Move that one over." I'll do it.

22 MS. FUMERTON: Okay. Will do. Thank you.

23 MR. LANIER: You bet.

24 MR. HYNES: Paul Hynes for CVS.

11:50:05 25 We want to note our objection to the

1 documents in Slides 105 and 125 just for reservation of
2 the record.

3 And then we have two objections to some of
4 the exhibits that plaintiffs' sent last night that they,
11:50:22 5 I guess, intend to use in their opening.

6 We can deal with the slides first. I
7 wasn't sure if there were any other slides.

8 SPECIAL MASTER COHEN: Did you say 105 and
9 125?

11:50:32 10 MR. HYNES: Yes.

11 SPECIAL MASTER COHEN: 125 is just the logo
12 of the National Association of Chain Drug Stores?

13 MR. LANIER: You mean 123, Perdue pains?

14 MR. HYNES: 123 -- ours are misnumbered.
11:50:44 15 Sorry about that.

16 MR. LANIER: Or 124.

17 SPECIAL MASTER COHEN: I hope I'm looking
18 at the same slides. My 123 just says Episode 8.

19 MR. LANIER: Yeah. It's 124, Your Honor.
11:50:53 20 It should say CVS and Perdue Partners Against Pain.

21 SPECIAL MASTER COHEN: Got it.

22 MR. HYNES: I apologize for the confusion.

23 SPECIAL MASTER COHEN: Okay. You said
24 you're objecting for the record.

11:51:03 25 I assume you're not expecting me to rule.

1 MR. HYNES: Correct.

2 SPECIAL MASTER COHEN: Go ahead.

3 MR. HYNES: Anyone else have any other
4 slides?

11:51:11 5 Okay.

6 SPECIAL MASTER COHEN: So to be clear,
7 defendants, I guess, yesterday or maybe this morning
8 filed a document that says defendants' objections to
9 plaintiffs' opening statement slides and documents
11:51:27 10 intended to be used in opening statements, and it has a
11 whole bunch of slides that you haven't addressed.

12 So are we skipping those?

13 MS. SWIFT: Special Master Cohen, Kate
14 Swift for Walgreen's.

11:51:43 15 We put those together last night in an
16 abundance of caution, and we were working quite quickly,
17 we've narrowed it down. The ones we've addressed are the
18 ones we wanted rulings on.

19 SPECIAL MASTER COHEN: Okay. Thank you.
11:51:53 20 Very good. I appreciate your narrowing.

21 Are there any issues, any other issues
22 defendants want to raise with regard to plaintiffs'
23 slides?

24 MS. SWIFT: I'm sorry. My partner was
11:52:07 25 speaking to me. I didn't hear what you said.

1 SPECIAL MASTER COHEN: I just asked if
2 there were any other issues defendants want to raise with
3 regard to plaintiffs' opening statements slides?

4 MS. SWIFT: The only other thing I would
11:52:17 5 say is we preserve the objections we raised in the
6 submission to you last night.

7 MS. FIEBIG: Special Master Cohen, I'm
8 sorry to be late to interject but could we ask about one
9 other slide that was noted on the objection list last
11:52:28 10 night while we have you here?

11 SPECIAL MASTER COHEN: Yes.

12 MS. FIEBIG: This is Chantale Fiebig
13 speaking for Giant Eagle.

14 We wanted to draw your attention to Slide 2
11:52:38 15 in which the plaintiffs say this case is about the
16 distribution and dispensing of opioids in Ohio and the
17 United States and we think that is a misstatement of the
18 scope of this case and it should be limited to Lake and
19 Trumbull county.

11:52:50 20 SPECIAL MASTER COHEN: So I was actually
21 kind of surprised defendants didn't raise this because
22 this was the one slide I looked at and thought it was a
23 little bit problematic.

24 I'm going to sustain that objection. What
11:53:01 25 I think this needs to say is this is about the

1 distribution and dispensing of opioids in Lake and
2 Trumbull Counties and the resulting community harm.

3 You're certainly welcome to say that what
4 happened in Lake and Trumbull Counties happened elsewhere
11:53:15 5 in Ohio, the United States, etc., but the slide is
6 different.

7 Go ahead.

8 MR. LANIER: No, Your Honor, that's not
9 our -- our contention is going to be quite different.

11:53:22 10 Our contention is the evidence from the DEA
11 and the evidence from the Ohio Board of Pharmacy and the
12 evidence from the defendants' records themselves indicate
13 that there was a pipeline of pills that came from Florida
14 up into Ohio.

11:53:37 15 It's the reciprocal argument in a sense to
16 the argument the defendants make that there's a pipeline
17 of drugs that run from Mexico up here on an illegal basis
18 for illegal drugs.

19 In the same way, there is an illegal drug
11:54:00 20 pipeline. In fact, in 2012, there was an Ohio drug ring
21 that was busted for hauling drugs up that were grabbed
22 illegally in Florida from the pill mills down there.

23 That's in the DEA PowerPoints. Joe
24 Rannazzisi. It's in a McKesson slide that is also within
11:54:20 25 these defendants' PowerPoints, at least one of them,

1 CVS's, I believe.

2 It is something that's within the Walmart
3 documents where Walmart talks about how the
4 Florida-to-Ohio pipeline is significant. And because
5 there is such a problem that these companies had, at
6 least some, CVS certainly, in Florida, that is a direct
7 cause of these issues in Ohio or so we will allege.

8 So this is dead on accurate for the case I
9 plan on presenting. It's about the distribution and
10 dispensing of opioids in Ohio and the United States, and
11 the resulting community harm.

12 I'm not after the harm anywhere except in
13 these counties. I can change "community" to "Counties."
14 I can change "Harm" to "Nuisance," but that's what it is.

15 And our case is pretty -- I mean this is an
16 important part of our case.

17 MS. FIEBIG: Can I respond?

18 SPECIAL MASTER COHEN: One second, please.

19 I can -- so here's what you're going to do
20 and here's what I'm going to do.

21 First of all, I'm going to take this one to
22 the Court, to Judge Polster, but I definitely want this
23 to say instead of the resulting community harm, the
24 resulting public nuisance in Lake and Trumbull Counties.

25 MR. LANIER: Okay.

1 SPECIAL MASTER COHEN: And the extent to
2 which Ohio and the United States remains is something
3 I'll present to the Judge.

4 Did you want to add anything else?

11:55:59 5 MS. FIEBIG: I would like to add just one
6 point which is Giant Eagle is a regional grocery store
7 that does not operate throughout the United States and it
8 certainly does not dispense opioids throughout the United
9 States, including in Florida or other states where the
11:56:11 10 plaintiffs may intend to introduce evidence.

11 And for that reason, we think that this
12 characterization is unduly prejudicial to Giant Eagle in
13 particular, and I expect that our co-defendants would
14 also join in asking that be changed to specifically refer
11:56:24 15 to distribution and dispensing opioids in the two
16 counties.

17 SPECIAL MASTER COHEN: Okay. Let me make
18 clear that I'm not restricting plaintiffs from making
19 assertions with regard to Ohio and the United States and,
11:56:36 20 for example, saying that the evidence will show that what
21 happened in Lake and Trumbull Counties was happening
22 elsewhere and that drugs were flowing from Florida into
23 Lake and Trumbull Counties, but we're talking about the
24 slides. And as I say, I'll take that secondary question
11:56:51 25 to the Judge.

1 Anything else from defendants?

2 MR. HYNES: Yes, Paul Hynes.

3 We have two hearsay objections, two hearsay
4 objections on two documents that may depend on how
11:57:11 5 plaintiffs plan to use those documents. We need to
6 address those objections now or later.

7 First one is P-459, a 30 or 40-page slide
8 deck. There are certain slides we have hearsay
9 objections to.

11:57:25 10 SPECIAL MASTER COHEN: Do I have those
11 documents?

12 MR. HYNES: Do plaintiffs have an extra
13 copy?

14 MR. LANIER: I'm glad to pass up a copy.

11:57:47 15 MR. HYNES: Thank you.

16 MR. LANIER: You bet.

17 Do you need one as well?

18 MR. HYNES: No, I'm good.

19 MR. LANIER: May I approach?

11:57:57 20 SPECIAL MASTER COHEN: Yes.

21 This is a document you intend to use during
22 openings?

23 MR. LANIER: Yes.

24 MR. HYNES: I don't want to waste your
11:58:04 25 time, Special Master Cohen.

1 So, Mark, there are certain pages you're
2 going to use that might help us decide if we need to
3 discuss this now or at some other time.

4 MR. LANIER: You bet.

11:58:15 5 My intention is to use what would be
6 labeled with the Bates Number at the end, 3109 and 3110.

7 Those are the only two pages I was going to
8 refer to.

9 SPECIAL MASTER COHEN: The copy you gave me
11:58:37 10 doesn't have that, those Bates numbers.

11 I have a P number and a CVS NYAG number.

12 MR. LANIER: It doesn't have a CVS number?

13 SPECIAL MASTER COHEN: It has a CVS NYAG
14 number but, no, not just a CVS number.

11:58:55 15 MR. LANIER: CVS NYAG.

16 SPECIAL MASTER COHEN: Go ahead.

17 MR. LANIER: 000073109.

18 SPECIAL MASTER COHEN: Sorry, got it.

19 MR. LANIER: And 3110.

11:59:14 20 SPECIAL MASTER COHEN: Sorry.

21 MR. HYNES: All right. We do have a
22 hearsay objection to 73110. Those are speaker notes from
23 a particular employee. She does not have the authority
24 to bind the company. And these statements were made
11:59:31 25 outside the scope of her employment. She was just giving

1 her personal feelings.

2 SPECIAL MASTER COHEN: How is it that these
3 are, quote, unquote, her personal feelings that are
4 contained within a CVS slide deck?

11:59:46 5 Is this Nickie Harrington?

6 MR. HYNES: It's not Nickie Harrington.

7 SPECIAL MASTER COHEN: So what am I looking
8 at on Page 110?

9 MR. HYNES: So if you turn to 73104, the
12:00:05 10 two presenters are Nicole Harrington and Angela Nelson.

11 Nicole Harrington has said these are not her words.
12 These are speaker notes that go along with the slide
13 deck. We believe they may be Ms. Nelson's, we don't know
14 for sure. She has not been deposed in this case.

12:00:24 15 But she is giving her own personal
16 feelings. She talks, when I start to really understand,
17 I realize, I made. She's not saying CVS.

18 And we'd like to draw the Court's attention
19 to Doc 3759 at Footnote 3 where it talks about how only
12:00:49 20 high-level employees may speak for and bind the company.

21 SPECIAL MASTER COHEN: Plaintiffs?

22 MR. LANIER: I mean, this is -- this is
23 their document. This is an employee. It's got Nickie
24 Harrington on it as well. The jury can decide whether to
12:01:08 25 believe Nickie Harrington or not when she testifies that

1 someone else said that in the slide deck, and she just
2 let it slide by or she didn't.

3 But, I mean, these are -- they are what
4 they are. It says what it says. It's the admission of a
12:01:22 5 party opponent so it's not hearsay. I don't see what the
6 objection is.

7 SPECIAL MASTER COHEN: I think it is either
8 an admission against interest or an admission of a party
9 opponent and the objection as to hearsay is overruled.

12:01:34 10 Next.

11 MR. HYNES: Our other objection is to
12 P-42147, and it's the *Holiday* decision. We would have
13 objections, hearsay objections to certain of that.

14 SPECIAL MASTER COHEN: I'm sorry. I didn't
12:01:49 15 hear you.

16 MR. HYNES: We have hearsay objections to
17 certain parts of that ruling. We recognize that some
18 parts may satisfy the public records exception, but the
19 parts of that ruling that just state or describe what the
12:02:02 20 law is don't apply the law to the facts, we don't think
21 meet the exception and we don't think plaintiffs can use
22 that ruling to displace the role of Judge Polster to
23 instruct the jurors on what the applicable law is.

24 SPECIAL MASTER COHEN: Oh, is the green
12:02:23 25 light on?

1 MR. HYNES: Yes.

2 SPECIAL MASTER COHEN: Okay. Response?

3 MR. LANIER: Yes. Thank you, Judge.

4 First of all, Judge Polster will direct the
12:02:32 5 jury on what the law is. That's what Judge Polster will
6 do and he certainly can give any instructions he wants,
7 but this is as clear a notice document as there could
8 ever be.

9 This decision not only formed policies for
12:02:45 10 the defendants based upon how it was written, but I think
11 almost every defendant, with the possible exception of
12 Giant Eagle, references this decision because it does
13 challenge what they're doing.

14 And so, for example, on page that ends with
12:02:59 15 a three, it's got the language, "Exception two, the ALJ's
16 findings that respondents dispensed controlled substances
17 pursuant to prescriptions which raised red flags that
18 could not be resolved and, thus, violated their
19 corresponding responsibility under federal law are not
12:03:19 20 supported by substantial evidence."

21 That's the exception that was raised and
22 then the ALJ answers and says yes, there is adequate
23 evidence.

24 And that's later on down below.

12:03:30 25 That's the reference that I was going to be

1 making to this, but this is -- I mean, this is -- this
2 document's in. I mean, there's -- I don't think -- I'm
3 stunned that there would be a fuss over this document
4 coming into evidence.

12:03:41 5 SPECIAL MASTER COHEN: I agree that it goes
6 to notice.

7 The objection is overruled.

8 MR. HYNES: That's all we have.

9 SPECIAL MASTER COHEN: Okay. I think that
12:03:53 10 plaintiffs also --

11 MS. FUMERTON: I have one.

12 SPECIAL MASTER COHEN: Yes.

13 MS. FUMERTON: I'm sorry. We just want to
14 reserve our objections to P-26699. It's a Walmart
12:04:03 15 document that we don't think they will be able to lay
16 appropriate foundation for. It was produced in 2020 but
17 not used with any witness in a deposition so, you know,
18 if Mr. Lanier wants to refer to it in his opening, we are
19 going to object to it later if they try to admit it into
12:04:17 20 evidence.

21 SPECIAL MASTER COHEN: Okay.

22 MR. STOFFELMAYR: Special Master Cohen,
23 Kaspar Stoffelmayr for the Walgreen's defendants.

24 I wanted to also just not argue an issue.

12:04:25 25 One of Plaintiffs' Exhibits is a document

1 that we've had privilege disputes over. You've ruled on
2 it, Judge Polster has ruled on it.

3 The last thing I want to do is argue about
4 it again. I understand it's going to be part of the
12:04:37 5 opening but I don't want there to be any suggestion that
6 happened except over our objection.

7 SPECIAL MASTER COHEN: Understood.

8 MR. STOFFELMAYR: Thank you.

9 SPECIAL MASTER COHEN: The record is clear
12:04:46 10 on that.

11 Thank you.

12 All right. My understanding is that
13 plaintiffs also themselves had some objections to some of
14 the Giant Eagle slides.

12:04:54 15 We need to finish it 20 after at the latest
16 so people can get some lunch and get ready for 1:00
17 o'clock, but I don't think I've received, unless it
18 happened within the last ten minutes, a copy of Giant
19 Eagle's slides via e-mail.

12:05:08 20 MS. FIEBIG: We did ask someone to e-mail
21 them to you but we also have hard copies we can provide.

22 SPECIAL MASTER COHEN: Thank you. Okay.

23 Plaintiffs, why don't you go ahead?

24 MR. LANIER: All right.

12:05:16 25 Your Honor, on the very first one you see,

1 there's a motion in limine ruling on mentioning good
2 deeds of the defendants apart from those on topic.

3 And the four generations of family values,
4 passion, hard work, innovation and competitive spirit
12:05:35 5 flies in the face of that motion in limine.

6 MS. FIEBIG: We disagree.

7 There isn't a single verb in that clause.
8 There's no reference to actions taken by the company.

9 The motion in limine ruling was limited to
12:05:53 10 in-store good deeds or corporate conduct, and obviously
11 this slide is not evidence, but it's, you know, at most
12 tantamount to puffery and just a description of the good
13 people of Ohio who work at the store.

14 SPECIAL MASTER COHEN: It's a little close
12:06:05 15 to the line but I agree, it's mostly puffery. The
16 objection is overruled.

17 MR. LANIER: The next slide, Your Honor, is
18 the one that seems to have lawyers with a plate for a
19 handout.

12:06:15 20 SPECIAL MASTER COHEN: Give me a page.

21 MR. LANIER: It's the very next page,
22 Page 2.

23 SPECIAL MASTER COHEN: Oh, go ahead.

24 MR. LANIER: Lawyers with plates like
12:06:24 25 they're getting a handout, and it lists a number of

1 settling defendants.

2 That's argumentative. That's got no place
3 in opening. The settlements, the Judge, I thought, had
4 ruled were not coming into evidence, but maybe I'm wrong
12:06:40 5 on that and lawyers with -- seeking a handout --

6 SPECIAL MASTER COHEN: What is this?

7 MS. FIEBIG: It's an animation. It's not a
8 handout, it's not a collection basket. It's just a
9 representation of the same plaintiffs' attorneys suing as
12:06:55 10 in filing lawsuits against other defendants in this MDL.

11 SPECIAL MASTER COHEN: That objection is
12 sustained.

13 It's coming out. Not even close.

14 MR. LANIER: The very next slide, Your
12:07:07 15 Honor, is Slide Number 3, and this is again trying to
16 make the case that there have been a lot of other
17 defendants in this case that are not currently in trial.

18 And to put this up here in front of the
19 jury in the complaint, to put this complaint in front of
12:07:28 20 the jury like this and argue that there are these other
21 defendants not present is not relevant and it's
22 prejudicial.

23 MS. FIEBIG: It's just a demonstrative to
24 contextualize the fact of the suit.

12:07:46 25 SPECIAL MASTER COHEN: So I don't have a

1 problem with your identifying that there are other
2 defendants, but the way you've identified them in this
3 slide, which presents them in the context of litigation,
4 is going to cause, I think, confusion and a lot of
12:07:59 5 questions for the jury.

6 So I'm going to sustain the objection.
7 That doesn't mean that you can't redraw this slide in a
8 way that identifies the fact that there are other
9 entities that you believe are responsible, other
12:08:09 10 defendants that are part of the opioid chain and
11 everything else, but not presented this way.

12 MS. FIEBIG: So just not with the
13 individual names of the corporate defendants?

14 SPECIAL MASTER COHEN: Well, not -- I mean,
12:08:19 15 you've made it look like a lawsuit.

16 You don't need to make all of that look
17 like a lawsuit. You can just list those folks as other
18 entities that you believe have a role, and maybe the
19 entire role.

12:08:33 20 MS. FIEBIG: Understood.

21 We'll revise the slide.

22 MR. LANIER: The next slide, Your Honor,
23 is -- it's labeled -- the very next slide in order, it's
24 labeled Slide Number 4. It's got the picture of the
12:08:51 25 foreign drug cartels flooding the illicit drug market.

1 You know, this is -- I think this is
2 actually written because there was one juror who made the
3 jury panel who said that he believes the problem is
4 foreign drug cartels flooding the illicit drug market, in
12:09:18 5 essence.

6 I mean, it just seems a little over the
7 line the way it's -- the photograph.

8 SPECIAL MASTER COHEN: Overruled.

9 Go ahead.

12:09:32 10 MR. LANIER: All right. Next, Your Honor,
11 is -- it's still considered Slide 4 but it's the fourth
12 bullet point down, aggressive marketing and promotion, so
13 you have to flip about four pages.

14 It's got the Perdue pled guilty to fraud
12:09:47 15 and kickback conspiracies, agreed to a \$3.5 billion
16 criminal fine and a \$2 billion criminal forfeiture, this
17 in a case where we're not allowed to show that the
18 defendants, the amount of money that they have paid in
19 fines and forfeiture.

12:10:05 20 Certainly, what Perdue has pleaded to and
21 what they have paid should not be coming into evidence in
22 this case.

23 MS. FIEBIG: We're happy to strike the
24 references to the amounts on that slide.

12:10:24 25 MR. LANIER: "Pled guilty to fraud and

1 kickback conspiracies"?

2 Again, that's not the issue in this case.
3 The issue in this case is whether or not these defendants
4 did something illegal; not whether or not Perdue did
12:10:41 5 something illegal.

6 MS. FIEBIG: If I may. Plaintiffs' expert,
7 Dr. Lembke, is the one who refers to the Perdue Pharma
8 Partnership Against Pain. It's in plaintiffs' report
9 that was submitted in this case.

12:10:55 10 And that's why there's a reference to that
11 material here.

12 MR. LANIER: And I have no problem
13 referencing that material.

14 I'll be referencing that material myself.

12:11:03 15 The problem I've got is "Perdue pled guilty
16 to fraud and kickback conspiracies."

17 SPECIAL MASTER COHEN: Well, if -- to put
18 the entity who maintains the most innocence because they
19 haven't had any ammo used at all, if Giant Eagle had pled
12:11:23 20 guilty to fraud and kickback conspiracies, that would be
21 admissible in this case, would it not?

22 MR. LANIER: Yes, sir.

23 SPECIAL MASTER COHEN: I think that if you
24 remove the amounts, that the rest of the slide is okay.

12:11:36 25 MS. FIEBIG: Thank you.

1 MR. LANIER: The next one is still a Slide
2 4 but it's several slides away. It's the bullet point of
3 pill mills/bad doctors prescribing for money.

4 SPECIAL MASTER COHEN: Yes.

12:11:49 5 MR. LANIER: It's got a picture of
6 Overholt's Pharmacy.

7 SPECIAL MASTER COHEN: Right.

8 MR. LANIER: And then it's got a picture of
9 people lined up, looks like sitting down, I guess,
12:11:59 10 waiting to go in and buy illegal narcotics or something.

11 I've been told that the picture may come
12 from a document that's in our possession. I'm not sure.
13 But I don't know how that comes into evidence.

14 I don't know who could even remotely
12:12:15 15 testify to what that picture is, whether I offer it or
16 someone else does.

17 MS. FIEBIG: It's just a demonstrative
18 illustration of one of the indicators that DEA
19 enforcement agents will testify that they often look to
12:12:30 20 for purposes of identifying pill mills. It's just a line
21 outside of the pharmacy.

22 And I believe that there are plaintiffs'
23 experts, including Rafalski, who may testify to it, but
24 it's really just an illustrative demonstration of that.

12:12:42 25 SPECIAL MASTER COHEN: Is this actually of

1 a line at Overholt's Pharmacy?

2 MS. FIEBIG: Yes, and it was produced in
3 discovery and used, I believe, in Track 1 at the McKesson
4 deposition.

12:12:52 5 SPECIAL MASTER COHEN: If that's what it
6 is, it can come in.

7 MR. LANIER: The next one are the, still on
8 Slide 4 but now we're down at the bottom, socioeconomic
9 mental health and addiction issues.

12:13:05 10 Certainly they are allowed to raise those
11 as causes of the opioid crisis, but I think the
12 photograph is over the top of the guy shooting the needle
13 into the arm, the woman passed out with open pills, the
14 guy snorting cocaine lines, and the person seemingly
12:13:23 15 drunk with still a drink in their hand.

16 MS. FIEBIG: Special Master, we think these
17 are on par with the images that appear in plaintiffs'
18 opening, including of the opium den and the needle with
19 the drugs which you have probably seen in their opening
12:13:43 20 slides as well.

21 These are just stock images representing
22 the overdose harms that we believe plaintiffs have put at
23 issue in this case.

24 SPECIAL MASTER COHEN: Can you point me to
12:13:53 25 the slides in plaintiffs? Because I don't recall those,

1 but I probably didn't even see them.

2 MS. FIEBIG: Yes, it's, Slide 15 is this
3 image of the drugs with the needle.

4 SPECIAL MASTER COHEN: One second.

12:14:07 5 Go ahead.

6 MS. FIEBIG: Slide 16.

7 SPECIAL MASTER COHEN: Go ahead.

8 MS. FIEBIG: Is also an image of illicit
9 drugs. Slide 116 also features a drug needle and pills.
10 And Slide 117 as well.

11 MR. LANIER: And to be clear, Your Honor,
12 there are other slides of the defendants that do have
13 needles and do have drugs that I've not objected to
14 because I think they are totally fine.

12:14:41 15 What I'm objecting to here are the people
16 who are in the process of snorting or passed out or on
17 the way to being passed out.

18 That's the objection; not -- I mean, the
19 drugs will come in. There's no question they come in.
12:14:55 20 And I've not objected to pictures of needles and drugs
21 and things like that that are in the other PowerPoints.

22 SPECIAL MASTER COHEN: Unfortunately, we're
23 dealing with a very ugly phenomenon, and this is a part
24 of what it looks like.

12:15:09 25 I'm going to overrule that.

1 MR. LANIER: Okay.

2 Next, Your Honor, is Slide Number 8,
3 doctors -- it's entitled, "Doctors concerned about
4 pharmacists second-guessing their medical decisions."

12:15:22 5 It's the AMA response to the pharmacy
6 intrusion into medical practice.

7 I don't know how this AMA document will
8 even remotely come into evidence. It's solid hearsay.
9 I've taken a deposition of an AMA fellow who will come
10 into evidence, but I don't see where that comes in.

11 MS. FIEBIG: We intend to illicit testimony
12 on this topic from Dr. Wailes who is a joint defense
13 expert in pain management. He's been very involved in
14 the California Medical Board and is also very familiar
12:15:59 15 with the American Medical Association. He'll testify
16 about his understanding of why the medical community
17 issued the statement at all, and this is not being
18 offered for the truth of the statement asserted herein.

19 It's also not being offered as evidence at
12:16:11 20 this point, obviously.

21 SPECIAL MASTER COHEN: Wailes is an expert?

22 MS. FIEBIG: Yes, he is.

23 SPECIAL MASTER COHEN: Overruled.

24 MR. LANIER: And then the last one is Slide
12:16:20 25 23. Slide 23 is a Government agent speaking. And again,

1 this is -- this is hearsay.

2 I mean it's plain and simple hearsay, so I
3 don't understand how it can be used.

4 MS. FIEBIG: This is taken from the
12:16:48 5 deposition of Agent DiFrangia on January 14th, and the
6 citation is at 6823 to 6910.

7 And Mr. DiFrangia is on plaintiffs' witness
8 list.

9 MR. LANIER: If this is out of his
12:17:04 10 deposition, and it's Q & A from his deposition, I
11 withdraw my objection. I just didn't know that.

12 MS. FIEBIG: It is.

13 SPECIAL MASTER COHEN: Okay.

14 MR. LANIER: Okay. Then I withdraw my
12:17:14 15 objection to that.

16 SPECIAL MASTER COHEN: Is that everything,
17 Mr. Lanier?

18 MR. LANIER: That concludes our objections,
19 Your Honor.

12:17:29 20 We did not have any objections to the other
21 defendants' slides.

22 SPECIAL MASTER COHEN: Okay. Thank you,
23 everybody, for all of that.

24 I believe that I owe you an answer still
12:17:38 25 for Plaintiffs' Number 2, Slide Number 2.

1 MR. LANIER: Judge, I cannot -- I cannot
2 hear you.

3 SPECIAL MASTER COHEN: I apologize. I was
4 looking down.

12:17:46 5 I said thank you, everybody, for everything
6 and I believe I owe you an additional answer still with
7 Plaintiffs' Number 2 and the United States/Ohio
8 reference, which I will do immediately as soon as I can
9 get in front of Judge Polster. I'll figure that out and
12:18:00 10 come back out.

11 Any other issues we need to address?

12 MR. STOFFELMAYR: David, Kaspar Stoffelmayr
13 for Walgreen's. I know it's not mission critical but you
14 did mention you might be able to get us some relief on
12:18:14 15 the huge glass barriers.

16 SPECIAL MASTER COHEN: Yes. I'll find out
17 right away.

18 MR. HYNES: Special Master Cohen, if we
19 could also ask for another microphone. All the other
12:18:23 20 counsel tables have two microphones.

21 We have one.

22 MR. MAJORAS: We have one.

23 MR. HYNES: They have one, also. They need
24 one, too. We can work with someone.

12:18:34 25 MS. FIEBIG: We have one to give.

1 MR. MAJORAS: Your Honor, we're one short
2 as well but if the Plexiglas gets removed, that will
3 accomplish a lot of help.

4 SPECIAL MASTER COHEN: That's something you
5 should raise with Robert.

6 I don't know what is even possible.

7 MR. HYNES: We'll do that.

8 Thank you.

9 MR. WEINBERGER: Special Master Cohen, we
10 have people, lawyers, on our team, who are sitting in the
11 gallery, and we want to make sure that they're able to
12 use their laptops or Smartphones.

13 There was some indication very early on, I
14 think in CT one, where the Court raised a concern about
15 that or maybe did not want that to occur.

16 And rather than passing notes, physical
17 notes, which disrupts the courtroom, we'd like the
18 opportunity to be able to use laptops and Smartphones to
19 do that.

20 SPECIAL MASTER COHEN: I'll find out.

21 MR. WEINBERGER: Thank you.

22 SPECIAL MASTER COHEN: All right.

23 Everybody, thank you very much.

24 Grab some lunch. We'll see you at 1:00
25 o'clock.

1 (Recess taken.)

2 (Proceedings concluded at 12:19 p.m.)

3 - - - -

4 C E R T I F I C A T E

5 I certify that the foregoing is a correct
6 transcript from the record of proceedings in the
7 above-entitled matter.

8

9

10

11 /s/Susan Trischan
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